(2)

No. 01-324

In The Supreme Court Of The United States

REGINALD A. WILKINSON, et al.,
Petitioners,

v.

HBRANDON LEE FLAGNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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69 pp.

TABLE OF CONTENTS

Appendix A (court of appeals's opinion, February 22, 2001) (241 F.3d 475) 1a

Appendix B (court of appeals's order denying rehearing, May 25, 2001) 33a

Appendix C (district court's order denying defendants' motion for summary judgment, August 24, 1999) 35a

Appendix D (district court's order adopting magistrate judge's report and recommendation, March 29, 1999) 43a

Appendix E (magistrate judge's report and recommendation, February 3, 1999) 49a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-4145

HBRANDON LEE FLAGNER,
Plaintiff-Appellee,

v.

REGINALD WILKINSON, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 96-00887 – Susan J. Dlott, District Judge.

Argued: October 16, 2000

Decided and Filed: February 22, 2001

Before: NELSON and MOORE, Circuit Judges; WILHOIT, District Judge.*

COUNSEL

ARGUED: Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION,

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* The Honorable Henry R. Wilhoit, Jr., Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

Columbus, Ohio, for Appellants. Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellee. **ON BRIEF:** Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS LITIGATION SECTION, Columbus, Ohio, for Appellants. Michael J. O'Hara, O'HARA, RUBERG, TAYLOR, SLOAN & SERGENT, Covington, Kentucky, for Appellee.

MOORE, J., delivered the opinion of the court, in which WILHOIT, D. J., joined. NELSON, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. The plaintiff, Hbrandon Lee Flagner, filed a 42 U.S.C. § 1983 action alleging that an Ohio prison grooming regulation violated his constitutional right to practice his religion. The defendants ask this court to reverse the district court's order denying the defendants' summary judgment motion based on qualified immunity, arguing that Flagner has not alleged a constitutional violation and that the regulation has a valid penological basis. Based on our precedent in *Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988), we **REVERSE** the district court's denial of the defendants' motion for summary judgment based on qualified immunity. We also conclude that Flagner may bring an as-applied challenge to the Ohio prison grooming regulation and that there is a factual dispute on the issue of whether the defendants have a valid penological interest. Accordingly, we **REMAND** to the district court so that

Flagner's claims for declaratory and injunctive relief may proceed.

I. BACKGROUND

Flagner has been incarcerated with the Ohio Department of Rehabilitation and Correction (ODRC) since 1986. Flagner is a practicing Orthodox Hasidic Jew who brought a § 1983 suit against prison officials challenging the enforcement of Ohio Administrative Code §§ 5120-9-25 (D) and (F),[1] a prison grooming regulation which requires Flagner to cut his beard and sidelocks, also referred to as

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[1] Ohio Administrative Code § 5120-9-25(D) provides the following:

> Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. *Hair and hairstyle shall not protrude more than three inches from the scalp.* Braids and plaits may be worn subject to the limitations of this rule. The following hairstyles or facial hair are not permitted: Initials, symbols, dyes, multiple parts, hair disproportionately longer in one area than another (excluding natural baldness), weaves, wigs, dreadlocks and shaved heads. Other hairstyles not specifically listed herein may be prohibited if they are determined to be either a threat to security or contrary to other legitimate penological concerns.

Ohio Admin. Code § 5120-9-25(D) (2000) (emphasis added). Subsection (F) provides, "[s]ideburns, beards, and moustaches must be neatly trimmed. *Facial hair must not protrude more than one-half inch from the skin.*" Ohio Admin. Code § 5120-9-25(F) (2000) (emphasis added).

"peos," in contravention of the tenets of his religious faith.[2] The defendants are ODRC employees who work at either the

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[2] *The Code of Jewish Law*, Chapter 170, entitled "The Prohibition Against Shaving the Corners of One's Head and Beard" provides the following:

> 1. [Leviticus 19:27 states: "Do not cut off [the hairs of] the corners of your heads and do not destroy the corners of your beards." Our Sages explain that] there are two "corners of the head," the place at which the skull is attached to the jawbone, near the ear at both the right and left sides of the head. [Shaving the hair off the "corners" is forbidden.]
>
> There are certain opinions that forbid cutting off the hair with scissors if it is done as effectively as if it were done with a razor – *i.e.*, removing all the hair, even that which is closest to the flesh. Therefore, if one is required to remove one's hair for medical reasons, one should be careful not to remove the hair closest to the flesh.
>
> *The area that is forbidden to be shaved extends from the hair on one's temples to below the ear, the place from which the lower jaw protrudes.*
>
> 2. The Torah forbade "destroying" the corners of the beard only with a razor. [Our Sages spoke of] five corners; [their definition, however, is a matter of question] and there are many opinions in this regard. Therefore, a God-fearing person should not pass a razor over his beard at all. [This includes] also his mustache and the hair below the chin.
>
> There is no difference between a razor and a sharp stone that cuts hair, *e.g.*, pumice stone. When using a

Lebanon Correctional Institution (LeCI) or the Madison Correctional Institution (MaCI). Flagner was imprisoned at LeCI from July 8, 1994 to November 20, 1996, and transferred shortly thereafter to MaCI. Prior to his transfer to LeCI, Flagner resided at the Mansfield Correctional Institution. He is currently incarcerated at Ross Correctional Institution.

In 1987, Flagner began studying Judaism and formally converted to Orthodox Judaism in 1991 while incarcerated at the Mansfield Correctional Institution. His religious affiliation has been recognized by the defendants and is not in dispute in this case. Flagner testified during the preliminary injunction evidentiary hearing held on December 3, 1996, that between 1991 when he converted to Judaism and prior to his transfer to LeCI in 1994, Mansfield prison officials did not make any effort forcibly to cut his beard or sidelocks. In fact, a period of five years passed between the time Flagner converted to Orthodox Judaism in 1991 until his first forced cutting in 1996.

On January 26, 1996, Flagner was given a direct order by Defendant Bobby Couch of LeCI, to comply with the grooming regulation, but Flagner refused, stating his religious tenets prevented compliance. On February 16, 1996, the Rule Infractions Board found Flagner guilty of disobeying the order and sentenced him to time in a disciplinary isolation

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> salve to remove one's beard – *e.g.*, a mixture containing lime – one should be careful not to scrape off the substance with a knife, lest one cut off some hair. Instead, one should scrape it off with a sliver of wood or the like.

Joint Appendix ("J.A.") at 140 (Pl.'s Ex. 4, Mem. from Aleph Inst. regarding Jewish Law) (emphasis added).

unit. On June 21, 1996, Flagner received another direct order from Defendant Couch to comply with the grooming regulation. Flagner then filed a grievance on June 28, 1996, which was reviewed by Defendant David Gardner, Inspector of Institutional Services, on July 11, 1996. In his disposition, Defendant Gardner stated that Flagner was in violation of § 5120-9-25(D) and was required to comply with the regulation. Failure to comply would subject Flagner to "appropriate disciplinary action [] [w]hich may include requiring [Flagner's] hair to be cut or trim[med] against [his] will." Joint Appendix ("J.A.") at 135 (Disposition of Grievance Form). Flagner continued to refuse to comply with the regulation. On July 29, 1996 and in April 1998, the defendants forcibly cut Flagner's beard and sidelocks. Between the time of Flagner's forced cuttings in July 1996 and April 1998, the defendants exempted him and four Native American inmates from the grooming regulation.

Defendant Curtis Wingard, the warden of MaCI testified in his deposition that exempting Flagner from the grooming regulation did not pose additional security problems at MaCI; no additional security precautions were taken with Flagner in excess of the security measures taken with inmates who complied with the grooming regulation. Defendant Wingard also testified that MaCI has neither been required to provide additional security, nor to approve additional overtime to provide security for Flagner and the four Native Americans who were exempted from the grooming regulation. The defendants have only searched Flagner's beard on less than five occasions. These searches have typically involved the defendant running his own fingers through his beard and sidelocks; this process generally took two to three seconds to complete, and contraband has never been recovered from Flagner's beard.

II. PROCEDURAL HISTORY

On September 6, 1996, Flagner filed a pro se § 1983 action against the Director of ODRC and the warden of LeCI where he was then incarcerated, alleging violations of his religious rights. On January 3, 1997, Flagner filed an amended complaint to include allegations against the warden at MaCI. The magistrate judge held an evidentiary hearing on January 9, 1997 regarding Flagner's motion for a preliminary injunction to prevent the defendants from forcibly cutting his beard and sidelocks. On January 14, 1997, the magistrate judge recommended granting Flagner's motion for preliminary injunction. The district court reversed the magistrate judge's Report and Recommendation and denied Flagner's motion in an order filed on August 8, 1997. The defendants moved for summary judgment on March 27, 1998, and Flagner filed a cross motion for partial summary judgment on June 8, 1998. On February 3, 1999, the magistrate judge entered a Report and Recommendation denying both the defendant's motion for summary judgment and Flagner's cross motion for summary judgment, which the district court adopted in an order dated March 29, 1999.

On May 13, 1999, the defendants filed a second motion for summary judgment based on qualified immunity which is at issue in the present case. On August 24, 1999, the district court entered an order denying the defendant's motion because "[a] reasonable prison official would have known in 1996 that he could not cut Flagner's beard and sidelocks in contravention of his sincerely held religious beliefs in the absence of legitimate penological interests relating to the enforcement of the hair length regulation."[3]

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[3] The district court also incorporated by reference the facts and analysis of the *Turner* factors, contained in the Report and Recommendation filed on February 3, 1999, J.A. at 144-

J.A. at 236-37 (D. Ct. Order of 8/24/99). The defendants timely filed their Notice of Appeal on September 20, 1999.

III. ANALYSIS

A. Jurisdiction

This court has jurisdiction over the appeal from the district court's order because denial of summary judgment based on qualified immunity is an immediately appealable collateral order. *See Mattox v. City of Forest Park*, 183 F.3d 515, 518 (6th Cir. 1999) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), which categorized the denial of qualified immunity as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). In *Johnson v. Jones*, a unanimous Supreme Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

B. Denial of Qualified Immunity

The determination of whether qualified immunity applies to an official's actions is a legal determination that we review de novo. *See Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996). A motion for summary judgment will be granted if the evidence presented to the court demonstrates that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477

57, and the March 29, 1999 district court Order adopting it. *See* J.A. at 234 (D. Ct. Order of 8/24/99).

U.S. 242, 247-48 (1986). We must not weigh the evidence, but rather we must only determine whether there is a factual dispute that precludes summary judgment. *See Liberty Lobby*, 477 U.S. at 249.

In *Harlow v. Fitzgerald*, the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects public officers "from undue interference with their duties and from potentially disabling threats of liability." *Id.* at 806. In *Butz v. Economou*, the Supreme Court explained that "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of [qualified] immunity." *Butz v. Economou*, 438 U.S. 478, 508 (1978).

As we explained in *Dickerson*, the first step in determining if the defendants are entitled to qualified immunity is to examine "whether, based on the applicable law, a constitutional violation occurred." *Dickerson*, 101 F.3d at 1157. If a constitutional violation is found, we next consider whether the violation involved "clearly established constitutional rights of which a reasonable person would have known." *Id.* at 1158 (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995)). To determine whether a constitutional right is "clearly established," we "'look first to the decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits.'" *Id.* (quoting *Buckner v. Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994) (citation omitted)). Under this framework, to plead a proper claim under 42 U.S.C. § 1983, "a plaintiff must identify a right

secured by the United States Constitution and the deprivation of that right by a person acting under color of state law," *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992), such that "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

After determining that a constitutional right is clearly established, the final step in our qualified immunity analysis is to inquire "whether the plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what [the official] allegedly did was objectively unreasonable in light of [the] clearly established constitutional rights." *Dickerson*, 101 F.3d at 1158 (quoting *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994)). "Summary judgment is not appropriate if there is a genuine factual dispute relating to whether the defendants committed acts that allegedly violated clearly established rights." *Id.*

Turning to the first prong of our qualified immunity analysis, we must ask whether a constitutional violation occurred. The Supreme Court has recognized that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Specifically, the Supreme Court has held that inmates retain First Amendment rights, *see Pell v. Procunier*, 417 U.S.817, 822 (1974), including the right to free exercise of religion. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (concluding that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty"). A prisoner alleging that the actions of prison officials violate his religious beliefs must show that "the belief or practice asserted is religious in the person's own scheme of things"

and is "sincerely held." *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987).

In this case, the sincerity of Flagner's religious beliefs is not in dispute. Flagner alleges that application of §§ 5120-9-25(D) and (F) violated his First Amendment free exercise rights. He asserts that despite his efforts to prevent prison officials from violating the tenets of his religious faith, the defendants forcibly cut his beard and sidelocks in 1996 and 1998.

The Supreme Court has held that in most circumstances, prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Wolfish*, 441 U.S. at 547. "To ensure that courts afford appropriate deference to prison officials," the Supreme Court has "determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). In *Turner v. Safley*, the Supreme Court articulated the proper standard as follows: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

We agree with the district court's conclusion in its March 23, 1999 Order adopting the magistrate judge's Report and Recommendation that the proper standard to apply in prisoner cases challenging restrictions on the free exercise of religion is supplied by the Supreme Court's decision in *Turner*, not by *Employment Division, Department of Human*

Resources of Oregon v. Smith, 494 U.S. 872 (1990).[4] In *Smith*, the Supreme Court concluded "that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." *Id.* at 886 n.3. Following the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA) which was later held unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). As the district court and magistrate judge correctly recognized, after the *Boerne* decision, our Circuit has consistently applied the pre-RFRA standard set forth in *Turner* to evaluate challenges by prisoners to restrictions on the free exercise of religion. *See, e.g., Spies v. Voinovich*, 173 F.3d 398, 403 (6th Cir. 1999) (applying the *Turner* standard to evaluate First Amendment free exercise challenges to prison regulations).

As we explain in Part C, we believe that Flagner has presented sufficient evidence that application of the grooming regulation would violate his constitutional rights. We agree with the district court that "material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns." J.A. at 236 (D. Ct. Order of 8/24/99). Under the Supreme Court's decision in *Johnson* we would not be able to exercise appellate jurisdiction because the Court has held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a

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[4] This Order dated March 23, 1999 was listed in the defendants' Notice of Appeal but was not included by the parties in the Joint Appendix.

district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20. In this case, with respect to the first prong of the qualified immunity analysis, there are genuine issues of material fact as to whether a constitutional violation occurred.

Our qualified immunity analysis, however, does not end here. We must now consider the district court's legal conclusion that "[a]t the time of plaintiff's initial forced haircut in 1996, the law was *clearly established* that prisoners retain the right to religious freedom and that prison officials may not deny inmates a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." J.A. at 235 (D. Ct. Order of 8/24/99) (quotation omitted) (emphasis added). In light of our decision in *Pollock*, we hold that the district court erred in concluding that the law was clearly established.

Flagner bears the burden "to allege and prove that the defendant official violated a clearly established constitutional right." *Buckner*, 36 F.3d at 539. In *Pollock v. Marshall*, we upheld the application of an earlier version of the challenged Ohio prison grooming regulation in an action involving a Lakota American Indian who sought to enjoin prison officials from cutting his hair in violation of his religious beliefs. *See Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988). We held that "[a]fter balancing the defendant's interest in keeping prisoners' hair short against the right of the plaintiff to exercise the religion of the Lakota Indians, . . . the regulation restricting hair length, *as applied* to the plaintiff, is not unconstitutional." *Id.* (emphasis added). The defendants in *Pollock* raised several legitimate penological concerns such as, "[q]uick

identification, removal of a place to hide small contraband, prevention of sanitation problems," and increased risk of sexual attacks on inmates with longer hair because "[l]onger hair increases the attractiveness of an inmate to other inmates." *Id.* at 659.

Although *Pollock* involved a challenge by a Lakota American Indian to an earlier version of § 5120-9-25(F) and in this case, Flagner, an Hasidic Orthodox Jew, brings a challenge to the current §§ 5120-9-25(D) and (F), "it need not be the case that 'the very action in question has previously been held unlawful." *Dickerson*, 101 F.3d at 1158 (quoting *Anderson*, 483 U.S. at 640). To deny qualified immunity protection to the defendants, the law requires that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson*, 483 U.S. at 640).

Based on our decision in *Pollock* which upheld an application of the challenged prison regulation, we conclude that Flagner's right to grow his beard and sidelocks in contravention of the Ohio prison grooming regulation at the time of his forced cutting was not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Russo*, 953 F.2d at 1042 (quoting *Anderson*, 482 U.S. at 640). We also recognize that our decision in *Pollock* has been followed in several unpublished opinions upholding the application of the Ohio prison grooming regulation at issue in this case. Because Flagner has not satisfied his burden to establish that the "defendant official[s] violated a clearly established constitutional right," *Buckner*, 36 F.3d at 539, the defendants are entitled to qualified immunity solely with respect to Flagner's money damages claims. It is thus unnecessary for us to consider the final prong of the qualified immunity analysis. Accordingly, we **REVERSE** the district court's denial of summary judgment to the defendants based on qualified immunity.

C. Declaratory and Injunctive Relief

The defense of qualified immunity protects officials from individual liability for money damages but not from declaratory or injunctive relief. *See Collyer v. Darling*, 98 F.3d 211, 228 n.18 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997); *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992). Thus, our reversal of the district court's denial of summary judgment based on qualified immunity does not preclude Flagner from going forward with his as-applied challenge to the Ohio prison grooming regulation insofar as he seeks declaratory and injunctive relief. "In considering a challenge to a prison policy as applied, the proper inquiry is whether the actions of the prison officials are reasonably related to legitimate penological interests." *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 103 (6th Cir. 1991), *cert. denied*, 503 U.S. 989 (1992) (citing *Thornburgh v. Abbott*, 490 U.S. 401 (1989)).

Flagner seeks declaratory and injunctive relief to prevent the defendants from forcibly cutting his beard and sidelocks in the future. Although we relied on our decision in *Pollock* to conclude here that the defendants are entitled to qualified immunity with respect to Flagner's damages claims, our holding in *Pollock* does not necessarily resolve the question of whether the defendants may in the future, continue forcibly to cut Flagner's beard and sidelocks.

Inmates retain rights to free exercise of religion. Prison officials may impinge on these constitutional rights only if the regulation "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. While courts should generally defer to the expertise of prison officials in matters involving prison administration, this deference is only afforded "in the absence of substantial evidence in the

record to indicate that the officials have exaggerated their response." *Wolfish*, 441 U.S. at 548. The plaintiff here, unlike the plaintiff in *Pollock* who did not challenge the factual underpinnings of the prison officials' justifications, has presented sufficient evidence to raise questions about the validity of the defendants' asserted penological interests.

As the Supreme Court directed in *Turner v. Safley*, courts employ a four-factor analysis to determine whether a prison regulation is reasonably related to legitimate penological interests.[5] *See Spies*, 173 F.3d at 403 (citing

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[5] Judge Nelson's reliance on *Spies v. Voinovich*, 173 F.3d 398, 403-04 (6th Cir. 1999), for the proposition that under *Turner*, courts are not to subject challenged prison regulations to "a four-factor analysis tailored to the plaintiff's individual circumstances" ignores controlling Supreme Court precedent. In *Thornburgh v. Abbott*, the Supreme Court considered both a facial and an as-applied challenge to a federal prison regulation concerning the receipt of subscription publications by inmates. *See Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989). Applying the *Turner* analysis, the Court concluded that the prison regulation at issue was facially valid; however, the Court remanded to the district court for further examination of the plaintiffs' as-applied challenges concerning 46 publications introduced at trial. *Id.* at 404. Under Judge Nelson's interpretation of *Turner*, as-applied challenges to prison regulations would be virtually impossible. The Supreme Court's decision in *Abbott*, however, demonstrates that under *Turner*, plaintiffs may pursue as-applied challenges to facially valid prison regulations.

Moreover, in *Spies*, we upheld the constitutionality of a prison regulation prohibiting inmate-led groups, concluding that *Turner* factors three and four "do not cut in favor of Spies, for he has also not demonstrated that the safety

Turner, 482 U.S. at 89). These factors are not necessarily weighed evenly, *see id.* at 403-04, but rather they are guidelines for the court to assess whether the prison officials' actions are reasonably related to a valid penological basis. *See Whitney v. Brown*, 882 F.2d 1068, 1076 (6th Cir. 1989). Under the first factor, the court must consider whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotation omitted). "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90.

The final three *Turner* factors should be balanced together. The second *Turner* factor to consider is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. The third *Turner* factor we consider "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff,

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concerns of prison officials related to accommodating his requests are exaggerated and does not offer any 'alternative means' by which prison officials can mollify their security concerns." *Spies*, 173 F.3d at 406. Thus, our own analysis in *Spies* demonstrates that "the plaintiff's individual circumstances" are indeed relevant in applying the *Turner* analysis. Unlike the inmate in *Spies*, Flagner has presented sufficient evidence that the prison officials' response to a supposed security concern was exaggerated. *See* discussion *infra* Part III.C.1. Flagner has also offered an alternative means which would accommodate his religious beliefs "at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 91; *see also* discussion *infra* Part III.C.2.

courts should be particularly deferential to the informed discretion of corrections officials." *Id.* With respect to the fourth *Turner* factor, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* Likewise, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91. However, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

1. *Turner* Factor One

In consideration of the first *Turner* factor, we now ask whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotation omitted). Defendant Wingard stated that the prison grooming regulation is necessary because "[l]ong hair and thick, full beards and sideburns provide good hiding places for such contraband as drugs and weapons." J.A. at 80 (Wingard Aff., ¶ 4). In the past, Defendant Wingard has recovered items such as tobacco, marijuana, and a razor blade from the hair of Ohio inmates. J.A. at 80 (Wingard Aff., ¶ 4). However, with respect to Flagner specifically, no contraband has ever been recovered by prison staff during any search of his beard and sidelocks.

The defendants next assert that the grooming regulation is necessary to promote their "compelling interest

in maintaining security within Ohio's prisons by freeing staff members from the increased demands on their time that would otherwise result from the more frequent, wide ranging and lengthier searches that would be necessary to attempt to control contraband." J.A. at 81 (Wingard Aff., ¶ 6). Defendant Wingard continued, "additional staff are simply not available to conduct the more frequent and time consuming searches that would be necessary if the Hair Length Regulations were not consistently enforced." J.A. at 82 (Wingard Aff., ¶ 7). Despite this facially appealing justification, Defendant Wingard conceded that no additional staff members were ever hired and no overtime was ever authorized to accommodate increased security demands caused by Flagner and the four Native American inmates when they were exempted from the regulation. J.A. at 260, 298 (Wingard Dep.). Moreover, the defendants are unaware of any additional security precautions that were ever taken on account of Flagner that exceeded the security precautions taken for inmates who complied with the hair length regulation. J.A. at 260 (Wingard Dep.). Defendant Wingard was also unaware of any security problems specifically attributed by prison staff to Flagner's beard and sidelocks. J.A. at 260 (Wingard Dep.).

The defendants also contend that the regulation "further[s] the compelling interest in maintaining security in Ohio's prisons by reducing the danger of injury to staff members and the tension that would otherwise follow from the increased close and/or physical contact resulting from the more frequent and more invasive searches that would be necessary to deal with contraband in inmates' hair." J.A. at 82 (Wingard Aff., ¶ 8). This rationale, however, is completely undermined by the fact that these cursory searches required minimal, if any, physical contact between the prison staff and Flagner, and involved Flagner running his own fingers through his beard and sidelocks, which took

approximately two to three seconds to perform. Furthermore, the defendants have only searched Flagner's beard and sidelocks on a few occasions. Assuming that "[t]he potential for injury to staff increases in direct proportion to the extent of their physical contact and physical proximity to inmates," J.A. at 82 (Wingard Aff., ¶ 8), given the minimal contact between the staff and Flagner and the infrequency of searches, which he essentially performs on himself, the risk of increased injury to the defendants caused by exempting Flagner from the regulation appears to be nominal.

Next, the defendants proffer that the grooming regulation is justified because it reduces gang activity by suppressing "gang identifiers." J.A. at 87 (Wingard Aff., ¶ 17). According to Defendant Wingard, the regulation promotes uniform appearance "that allows corrections officials to more readily detect the use of hair as an identifier"; moreover, "limitations on the quantity of hair on an inmate[]'s head limits the number of ways in which the hair style can be modified for use as an identifier." J.A. at 88 (Wingard Aff., ¶ 21). Although it may be true that the challenged grooming regulation, as a general matter, helps alleviate the proliferation of "gang identifiers," there is no evidence in the record that Flagner's beard and sidelocks have ever been mistaken for a "gang identifier."

Next, the defendants assert that the grooming regulation is needed to promote ready identification of escaped inmates. Allowing an inmate to grow "long hair or a thick, full beard can [permit the inmate to] dramatically alter his appearance upon escape by changing his hair and beard length and/or style." J.A. at 89 (Wingard Aff., ¶ 24). The defendants argue that it is administratively burdensome to update continually their record of inmate photographs if inmates were allowed to alter their appearance by growing long hair or thick facial hair. The defendants further contend

that "it is essential to distribute an accurate picture of an escapee as quickly as possible after an escape and having to distribute multiple pictures is more difficult." J.A. at 90 (Wingard Aff., ¶ 25).

The grooming regulation, however, does not completely prevent the risk of an escapee altering his own appearance after escaping from prison. With respect to Flagner specifically, there is no evidence in the record that he has ever attempted to escape from prison. In addition to a photograph of Flagner, the defendants also have on file four professionally-made sketches of him bearing various beard and sidelock lengths and one sketch of Flagner with no facial hair at all. In the event that Flagner ever escaped from prison, these sketches would help to identify him because they show a range of his possible appearances.

Finally, the defendants argue that "[l]ong hair can lead to increased plumbing problems by making clogged drains more frequent." J.A. at 91 (Wingard Aff., ¶ 27). Even if we were to assume this to be true as a general matter, there is no evidence in the record that any clogged drains were ever attributed to Flagner's beard or sidelocks.

Based on the defendants' asserted justifications, followed by Flagner's demonstration of the lack of a factual basis for those justifications as applied to himself, the first *Turner* factor weighs heavily in favor of Flagner. The defendants have not had any security problems with Flagner, nor have they spent additional resources to provide extra security to perform searches of his beard and sidelocks. The defendants have multiple sketches of Flagner for ready distribution if he ever escaped. Finally, nothing in the record suggests that Flagner's beard and sidelocks have ever clogged the sinks or showers of the prison.

2. *Turner* Factors Two, Three, and Four.

Looking to the second *Turner* factor, there are no alternatives that remain open to Flagner in the exercise of his religion should the grooming regulation be upheld. None of the other aspects of Flagner's religion could ever compensate for the fact that an essential tenet of his religious beliefs prevents him from cutting his beard or sidelocks, and that enforcement of the grooming regulation would require the plaintiff to violate this very tenet.

As to the third *Turner* factor, the evidence in the record shows that no prison resources were ever diverted to accommodate the plaintiff and the then-exempted Native American inmates. J.A. at 294 (Wingard Dep.). The defendants also admitted that no extra guards were ever hired or overtime authorized to respond to additional security risks by Flagner and the other then-exempted inmates. J.A. at 260, 298 (Wingard Dep.). There is also no evidence in the record that other inmates resented Flagner because he was allowed at one time to grow out his beard and sidelocks.

The lack of an undue impact "on guards and other inmates, and on the allocation of prison resources generally," *Turner*, 482 U.S. at 90, also speaks to the final factor which is that having Flagner search his own beard is an "alternative that fully accommodates the plaintiff at *de minimis* cost to valid penological interests." *Id.* at 91. The defendants have already admitted that the accommodation of Flagner and the four Native American inmates did not cause the institution any financial hardship. J.A. at 294 (Wingard Dep.).

On balance, the second, third, and fourth *Turner* factors also weigh heavily in favor of Flagner because they demonstrate a lack of viable alternatives for Flagner to exercise his religion should the regulation be upheld, as well

as the absence of an undue negative impact on the prison community and its resources. Thus, looking at the totality of all four *Turner* factors, Flagner has presented sufficient evidence which raises serious questions concerning the validity of the defendants' asserted penological interests. As we noted earlier, courts generally defer to the expertise of prison officials "in the adoption and execution of polices and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Wolfish*, 441 U.S. at 547. In *Brown v. Johnson*, we concluded that "[a]s long as prison authorities present evidence to support their judgment that prison security will be undermined in the absence of a challenged regulation, we will not substitute our judgment for theirs." *Brown v. Johnson*, 743 F.2d 408, 412-13 (6th Cir. 1984), *cert. denied sub nom. Inosencio v. Johnson*, 469 U.S. 1215 (1985). However, we afford no deference to the policies and judgments of prison officials if there is "substantial evidence in the record to indicate that the officials have exaggerated their response." *Pell*, 417 U.S. at 827.

Consistent with these principles, in *Whitney v. Brown* we held that a prison policy which prohibited the intercomplex travel of six Jewish inmates for Sabbath services and annual Passover Seders was "an exaggerated response to speculative security objectives, and, therefore it [wa]s invalid." *Whitney*, 882 F.2d at 1078. In *Whitney*, we rejected a conclusory approach where "anything prison officials can justify is valid because they have somehow justified it." *Id.* at 1074. Like the defendants in *Whitney*, the defendants here have articulated a list of generalized concerns regarding the impact of exempting Flagner from the grooming regulation. Flagner, however, has demonstrated the absence of a factual basis for these penological concerns and has thereby called into question the credibility of those assertions. Resolution of these credibility issues can be best

achieved by the trial judge during further proceedings regarding Flagner's as-applied challenge to the grooming regulation.

Flagner is the only Orthodox Jew at MaCI, which has a population exceeding 2,500 inmates, who is requesting an exemption from the Ohio prison grooming regulation based on religious reasons. J.A. at 274-75 (Wingard Dep.). The fact that the defendants managed to wait five years before forcibly cutting Flagner's beard and sidelocks from June 1991 to July 1996 only further suggests that the defendants may be exaggerating their response to the potential security threats posed by permitting Flagner to grow his beard and sidelocks in a manner that is consistent with his religious beliefs.

Our reversal of the district court's denial of summary judgment based on qualified immunity does not preclude Flagner's as-applied challenge to the Ohio prison grooming regulation from proceeding. Accordingly, we **REMAND** to the district court for further consideration of Flagner's claims for declaratory and injunctive relief.

IV. CONCLUSION

Based upon the foregoing, the district court's order denying the defendants' motion for summary judgment based on qualified immunity is **REVERSED** insofar as Flagner seeks damages. Flagner may, however, continue with his action seeking declaratory and injunctive relief against the application of the Ohio prison grooming regulation, having presented a genuine issue of material fact regarding the validity of the defendants' penological justifications for the regulation. We therefore **REMAND** to the district court to allow Flagner's as-applied challenge seeking declaratory and injunctive relief to proceed.

CONCURING IN PART, DISSENTING IN PART

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. I concur in the conclusion that the qualified immunity doctrine bars plaintiff Flagner from attempting to mulct the defendants in damages for requiring him to comply with Ohio's prison regulation regarding facial hair. But because I believe that the defendants are entitled to prevail at the first stage of the qualified immunity analysis – *i.e.*, because I believe that the application of the regulation to Mr. Flagner is permissible under the Constitution as a matter of law – I would not let the claims for declaratory and injunctive relief go forward.

The district court's first-stage rationale was as follows:

> "[M]aterial issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. * * * Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns."

My colleagues on the panel agree with this rationale. I respectfully disagree. I am aware of no basis on which the regulation could properly be held invalid on its face, and it seems to me that the very existence of the regulation justifies its enforcement against Mr. Flagner.

Even under the restrictive statutory standard rejected by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the constitutionality of regulations such as

Ohio's was routinely upheld. See, for example, *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996), and *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). Post-*Boerne* decisions, of course, have reached the same result. See, *e.g.*, *Green v. Polunsky*, 229 F.3d 486 (5th Cir. 2000), and *Kimbrough v. California*, No. 00-15075, 2001 U.S. App. LEXIS 1864 (9th Cir. 2001). Within this circuit, Ohio's prison hair regulation has repeatedly been upheld against challenges under the Free Exercise Clause of the First Amendment. See *Williams v. Wilkinson*, No. 96-3715, 1997 U.S. App. LEXIS 36760 (6th Cir. 1997); *Brown v. Wilkerson*, No. 94-4014 (6th Cir. 1995); *Pollock v. Marshall*, 845 F.2d 656 (6th Cir. 1988). See also *Mays v. Wilkinson*, No. 98-3341, 1999 U.S. App. LEXIS 8380 (6th Cir. 1999) (unpublished order) (affirming dismissal for failure to state a claim where Ohio hair regulation was challenged under constitutional provisions other than the Free Exercise Clause).

I do not read *Turner v. Safley*, 482 U.S. 78 (1987), as suggesting that an "as applied" approach can routinely be used to circumvent a well-established body of law such as that upholding the Ohio regulation. Speaking through Justice O'Connor, the *Turner* Court noted that "[r]unning a prison is an inordinately difficult undertaking that requires expertise . . . peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. Moreover, the Court continued, "[p]rison administration is . . . a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* at 85. Against this background, and after an analysis of the facial validity of challenged Missouri prison regulations under the four "factors" discussed in the majority opinion here, the *Turner* Court upheld the validity of the first of the regulations (a prohibition against correspondence between inmates at different state prisons) on

the ground that, as a matter of law, it was "reasonably related to legitimate security interests." *Id.* at 91. The same sort of categorical analysis led the *Turner* Court to invalidate the other challenged regulation, a ban on inmate marriages.

The *Turner* opinion does not imply that an inmate who seeks to challenge a prison regulation the constitutionality of which has already been established is entitled to have the regulation subjected to fresh scrutiny under a four-factor analysis tailored to the plaintiff's individual circumstances. In a published opinion by which I should have thought this panel bound, our circuit has flatly rejected the idea that prisoners are entitled to this sort of individual fitting:

> "By creating the *Turner* test, the Supreme Court surely did not intend to provide a mechanism through which prisoners could mount repeated challenges to prison regulations and require courts to analyze, in detail, the impact such regulations would have in any particular factual setting, even if prior court precedent would seem to dictate the validity of the regulations. On the contrary: the Supreme Court's creation of the *Turner* standard was motivated by a desire to 'ensure[] the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, and avoid[] unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree.' *O'Lone*, 482 U.S. at 349 (quotation marks omitted). Penal authorities may need a clear rule for dealing with certain continuing or recurring situations, even when that rule could be better-tailored to the rights of individual prisoners through a court's flexible, case-by-case analysis."

Spies v. Voinovich, 173 F.3d 398, 403 - 04 (6th Cir. 1999).

It may be true, I suppose, that if Mr. Flagner were the only inmate in the Ohio prison system he could show that the hair regulation is not reasonably related to legitimate security interests peculiar to him. It may be true, in other words, that Mr. Flagner himself has never concealed contraband in his beard or sidelocks; that prison officials could easily and safely assure themselves of Mr. Flagner's continuing good behavior by having him run his own fingers through his hair; that no security problems of any kind have ever been associated with Mr. Flagner's facial hair; that his beard and sidelocks have never been mistaken for a "gang identifier;" that he has never attempted to escape from prison; that if he were to escape and shave off his facial hair in an effort to make himself harder to recognize, the effort would be unsuccessful because the authorities happen to have old photographs and sketches depicting him without such hair; and that Mr. Flagner's beard and sidelocks have never contributed to the clogging of drains in the prison's plumbing system. If all this were shown to be true, if we were writing on a clean slate, and if Mr. Flagner were Ohio's only prison inmate, I might well agree with my colleagues that the regulation should not be allowed to burden Mr. Flagner's right to put into practice his religious beliefs concerning facial hair.

But we are not writing on a clean slate, and Mr. Flagner, unfortunately, is not Ohio's only prison inmate. As of January 2001, according to an Ohio Department of Rehabilitation and Correction "Fact Sheet" available on the internet at www.drc.state.oh.us, Ohio's prison inmate population was 45,540. If three percent of the state's male prison population were to accept the majority opinion's

implied invitation to challenge the regulation on grounds comparable to those Mr. Flagner is being allowed to invoke here, the *Turner* factors would have to be separately weighed by the courts in something like 1,000 cases. And that is just in Ohio.

Such an outcome, in my view, would be undesirable. It would also be difficult to reconcile with the proposition – explicitly alluded to in *Turner* – that "judgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials . . . .'" 482 U.S. at 86 (quoting *Pell v. Procunier*, 417 U.S. 817, 827) (1974).

The conclusion that Mr. Flagner's claim is without legal merit finds support, I believe, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), a decision handed down three years after the decision in *Turner*. The question in *Smith* was whether the State of Oregon could deny unemployment benefits to people who had been fired from their jobs for ingesting a prohibited hallucinogen (peyote) in connection with sacramental activities at a Native American church. The Supreme Court answered in the affirmative, reasoning that where the state's object is not to prohibit or burden the exercise of religion, and any burden imposed by the state is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878.

Unlike *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) – a case where, as the *Smith* Court noted (494 U.S. at 884), a prison's refusal to excuse inmates from work to attend worship services was sustained without mention of a "balancing" test – *Smith* did not involve a prison regulation. Oregon's prohibition against the payment of benefits to

jobless users of illegal drugs was applicable to the citizenry of the state as a whole. And if the state's blanket prohibition against the payment of benefits to such people was sustainable notwithstanding its incidental effect on the religious practices of adherents of the Native American Church, it would seem to follow *a fortiori*, given the need for judicial restraint in the prison context, that a regulation such as the one at issue here should be sustainable notwithstanding the incidental burden it may place on the religious tenets of some prisoners.

The *Smith* Court was obviously content to follow a categorical approach in determining the constitutionality of the Oregon law. The Court seemed to take it for granted that because the law was constitutional as generally applied, the plaintiffs had no viable free exercise claim.[1] This reading is

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[1] It is true, as my colleagues on the panel point out in note 5 of the majority opinion, that a Federal Bureau of Prisons regulation banning the delivery to prisoners of periodical publications found "detrimental to institutional security" – a regulation held to be valid on its face – could be found invalid as applied to a particular publication. See *Thornburgh v. Abbott*, 490 U.S. 401 (1989). But I do not read *Thornburgh v. Abbott* as justifying a remand in the case at bar.

Here, as in *Turner v. Safley*, the plaintiffs would have been free, had this been a case of first impression, to attempt to show that the challenged regulation represented an "exaggerated response" to prison concerns, given the alleged existence of "obvious, easy alternatives . . . ." See *Turner*, 482 U.S. at 90. Had such a showing been made, a court could have considered it "as evidence that the regulation does not satisfy the reasonable relationship standard . . . ." *Id.* at 91. But our court has already held, in a Free Exercise Clause

strengthened by the latter part of the *Smith* opinion's penultimate paragraph, where the Court rejected the idea that a religious-practice exception to the general rule was mandated by the First Amendment:

> "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the

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context quite similar to the context in which the present appeal arises, that *Turner* cannot justify a remand for factfinding of the sort contemplated by my colleagues on the panel. See *Spies v. Voinovich*, 173 F.3d at 407. Such a remand, as *Spies* declared, "would be the type of 'unnecessary intrusion of the judiciary' into 'problems of prison administration' that *O'Lone* warned against." *Id.*

I can readily understand why my colleagues might wish that the judge who urged a remand in *Spies* had been writing the majority opinion rather than the dissent, just as I can readily understand why they might wish that the views of the Supreme Court justices who urged a remand in *O'Lone* had prevailed. But given the majority holdings in *Spies* and *O'Lone*, and given the post-*Abbott* holding in *Employment Division v. Smith*, I have greater difficulty understanding how it can be thought that we are free to order a remand here.

centrality of all religious beliefs." *Smith*, 494 U.S. at 890.

Insofar as my colleagues on the panel have concluded that the courts can and should discern appropriate occasions for waiving Ohio's prison hair regulation on a case-by-case basis, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-4145

HBRANDON LEE FLAGNER,
Plaintiff-Appellee,

v.

REGINALD WILKINSON, et al.,
Defendants-Appellants.

Filed: May 25, 2001

Before: NELSON and MOORE, Circuit Judges; WILHOIT, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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* The Honorable Henry R. Wilhoit, Jr., Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-96-887

HBRANDON LEE FLAGNER,
Plaintiff,

v.

REGINALD WILKINSON, et al.,
Defendant.

Filed: August 24, 1999

ORDER

[District Judge Susan J. Dlott]

On March 29, 1999, the Court adopted the Report and Recommendation of the Magistrate Judge denying both defendants' motion for summary judgment and plaintiff's partial cross-motion for summary judgment. (Doc. 49). On April 14, 1999, the Court granted defendants leave to file a second motion for summary judgment in this matter. This matter is before the Court on defendants' second motion for summary judgment on the basis of qualified immunity and a

recent decision from the Sixth Circuit (Doc. 54), and plaintiff's memorandum in opposition. (Doc. 55).[1]

Plaintiff is an inmate at the Madison Correctional Institution (MaCI) and former inmate at the Lebanon Correctional Institution (LeCI). He brings this action pursuant to 42 U.S.C. § 1983 challenging various practices of defendants which allegedly violate his First Amendment right to freely exercise his religious beliefs. Defendants are Reginald Wilkinson, director of the Ohio Department of Rehabilitation and Correction, the warden and various employees of the Lebanon Correctional Institution, and the warden of the Madison Correctional Institution. At issue in this case is defendants' enforcement of Ohio Administrative Code § 5120-9-25 (D) and (F), the grooming regulation which requires plaintiff to cut his beard and side locks shorter than permitted by the religious tenets of his Orthodox Hasidic Jewish faith. Plaintiff has alleged and, for purposes of their motion for summary judgment, defendants have accepted that a central tenet of plaintiff's religious faith prohibits the cutting of his side locks or shaving or cutting his beard. Defendants forcibly cut plaintiff's side locks and beard on July 29, 1996 and in April 1998.

In its Order denying defendants' first motion for summary judgment, the Court engaged in a lengthy analysis of defendants' decision to cut plaintiff's beard and side locks

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[1] The Court notes that the defense of qualified immunity protects officials from money damages, but not from injunctive or declaratory relief. *Collyer v. Darling*, 98 F.3d 211, 228 n.18 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997); *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992). Thus, plaintiff's claims for injunctive and declaratory relief are not subject to defendants' second motion for summary judgment based on qualified immunity.

under the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). The Court shall not repeat that analysis here, but shall incorporate by reference the facts and analysis set forth in the Report and Recommendation and Order adopting it. (Docs. 41, 49).

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party must demonstrate the absence of genuine disputes over facts which, under the substantive law governing the issue, could affect the outcome of the action. *Celotex Corp.*, 477 U.S. at 323.

Defendants contend that they are entitled to qualified immunity as a matter of law on plaintiff's First Amendment claim. Government officials, including prison officials, "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" *Black v. Parke*, 4 F.3d 442, 444 (6th Cir. 1993), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity insulates government officials from individual liability for money damages. *See, e.g., Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992).

A constitutional right is "clearly established," thereby precluding the application of qualified immunity, if "the law [is] clear in regard to the official's particular actions in the particular situation." *Black*, 4 F.3d at 445, quoting *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991). *See also Ward v. Dyke*, 58 F.3d 271, 273 (6th

Cir.), *cert. denied*, 516 U.S. 991 (1995); *Mackey v. Dyke*, 29 F.3d 1086, 1094 (6th Cir. 1994). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Black*, 4 F.3d at 445, quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The official, therefore, will be immune "if officers of reasonable competence could disagree" on whether his conduct violated the plaintiff's rights. *Caldwell v. Moore*, 968 F.2d 595, 599 (6th Cir. 1992), quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Once a defendant raises a qualified immunity defense, the plaintiff must satisfy a two prong analysis: (1) the allegations must state a claim for violation of clearly established law; and (2) the plaintiff must present evidence sufficient to create a genuine issue of material fact as to whether a defendant in fact committed the acts alleged. *Williams v. Pollard*, 44 F.3d 433, 434 (6th Cir. 1995), *cert. denied*, 516 U.S. 815 (1995); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994); *Russo v. Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992).

At the time of plaintiff's initial force haircut in 1996, the law was clearly established that prisoners retain the right to religious freedom and that prison officials may not deny inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Cruz v. Beto*, 405 U.S. 319, 322 (1972). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). The law relating to the Free Exercise Clause of the First Amendment in prisons permits infringement on a prisoner's free exercise of his religious beliefs only to the extent that such infringement is "reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349, quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). As discussed previously by the Court in its

Order denying defendants' first motion for summary judgment, this reasonableness inquiry is guided by the four *Turner* factors: whether there is a valid and rational connection between the regulation or restriction and the asserted governmental objective; whether plaintiff has alternative means of exercising his right of freedom of religion; the impact that accommodation of the asserted right will have on others, such as inmates and guards, in the prison; and the existence of ready alternatives to the regulation or restriction that fully accommodate plaintiff's rights. *Turner*, 482 U.S. at 89-91. *See Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988) (applying *Turner* analysis to an inmate's free exercise claim). *See also Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999).

Defendants contend that the Sixth Circuit and district courts have repeatedly upheld Ohio's grooming regulation in the face of inmate challenges based on the free exercise of religion. *See Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988) (Lakota American Indian); *Williams v. Wilkinson*, 96-3715 (6th Cir. Dec. 18, 1997) (unreported) (Rastafarian); *Syder v. Voinovich*, C2-94-0536 (S.D. E.D. Ohio March 31, 1998) (unreported) (Native Americans); *Davie v. Wingard*, 958 F. Supp. 1244 (S.D. Ohio, Eastern Div. 1997) (Nazarite); *Wellmaker v. Dahill*, 836 F. Supp. 1375 (N.D. Ohio 1993) (Nubian Islamic Hebrew). Defendants claim that in view of these cases, it was objectively reasonable for them to deny an exemption to plaintiff on the basis of his religion.

However, this Court has previously recognized that the cases cited by defendants are distinguishable from the instant case because the plaintiffs in those cases did not challenge the factual basis for the penological justifications asserted by prison officials. (Doc. 49 at 4). Here, plaintiff

presented extensive evidence attacking the validity of each penological interest advanced by defendants. (Doc. 49 at 4).

This case is more akin to *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), where the Court struck down a prison policy which eliminated the intercomplex travel of Jewish inmates to weekly Sabbath services and annual Passover Seders. The *Whitney* Court analyzed the policy and justifications therefor under *Turner* and *O'Lone* and found an absence of a factual underpinning relating to the justifications. 882 F.2d at 1073-77. Although *Whitney* did not address the issue of qualified immunity, it supports the position that *Turner* and *O'Lone* provide the "clearly established" law in this case: that the law requires some basis in actual fact for the justifications posed by prison officials, and not merely unsupported generalities.

As of the date of defendants' decision to enforce the grooming regulation against plaintiff, the law was clearly established, by decisions of the Supreme Court and Sixth Circuit, that prison officials could infringe upon plaintiff's First Amendment right to freely practice his religion only where such actions were "reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349; *Turner*, 482 U.S. at 89; *Whitney*, 882 F.2d at 1073-74. As discussed in the Report and Recommendation and the Court's Order adopting it, material issues of fact exist as to the legitimacy of defendants' proffered justifications for enforcing the hair regulation against plaintiff. (Doc. 41 at 8-13; Doc. 49 at 4-5). Plaintiff has come forward with evidence from which a trier of fact could reasonably conclude that defendants' enforcement of the grooming regulation against plaintiff was an exaggerated response to or not done for the asserted security concerns. A reasonable prison official would have known in 1996 that he could not cut plaintiff's beard and side locks in contravention of plaintiff's sincerely held religious

beliefs in the absence of legitimate penological interests relating to the enforcement of the hair length regulation. Although the Court must accord deference to state officials in their administration of prison facilities, *Turner*, 482 U.S. at 85; *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), the Court cannot disregard an inmate's constitutional rights whenever prison officials articulate a possible, but unsubstantiated, security concern. Whether it was objectively reasonable for defendants to believe that their acts were lawful is an issue of fact. Accordingly, defendants are not entitled to the protection of qualified immunity.

Finally, defendants urge the Court to reconsider its previous decision on summary judgment in view of *Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999). In *Spies*, the Sixth Circuit upheld the lower court's dismissal of an inmate's claim that various prison regulations violated his free exercise rights. In evaluating the prisoner's claim under *Turner*, the Court of Appeals noted that "a trial court is not required to weigh evenly, or even consider explicitly, each of the four *Turner* factors." 173 F.3d at 403.

As previously discussed, this Court has already engaged in a lengthy *Turner* analysis and has explicitly considered each of the four *Turner* factors. The Court discerns no reason to revisit or eliminate any of its previous analysis just because an explicit discussion of each *Turner* factor was not required in the first instance. The Court therefore declines to reconsider its previous decision on summary judgment in light of the *Spies* decision.

Accordingly, defendants' second motion for summary judgment is **DENIED.**

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-96-887

HBRANDON LEE FLAGNER,
Plaintiff,

v.

REGINALD WILKINSON, et al.,
Defendant.

Filed: March 29, 1999

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

[District Judge Susan J. Dlott]

On February 3, 1999, the Honorable Magistrate Judge Sherman issued a Report and Recommendation (doc. #41) to deny both Defendant's Motion for Summary Judgment and Plaintiff's Partial Cross-Motion for Summary Judgment. Plaintiff and Defendant both filed Objections to the Magistrate Judge's Report and Recommendation (docs. #43 and #45, respectively). Upon consideration of the law and the facts, the Court hereby ADOPTS the well-reasoned Report and Recommendation of Magistrate Judge Sherman.

I. BACKGROUND

The Court will provide only a brief statement of relevant facts. A more thorough exposition can be found in the Report and Recommendation. Plaintiff Hbrandon Lee Flagner is an inmate at the Madison Correctional Institution ("MaCI") and former inmate at Lebanon Correctional Institute ("LeCI"). Defendants are Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Corrections, and officials from MaCI and LeCI. Flagner filed a Complaint alleging, in part, that Defendants' enforcement of Ohio Administrative Code § 5120-9-25(D) & (F) violates his rights under the Free Exercise Clause of the Constitution. The Code sections are Hair Length Regulations mandating that hair not grow more than three inches from the scalp and that beards do not exceed one-half inch in length.

Flagner alleges that as an Orthodox Hasidic Jew a central tenant of his faith prohibits the cutting of his sidelocks or the shaving or cutting his beard. He further alleges that the Hair Length Regulations require him to violate that central tenant. Defendants do not contest the sincerity of Flagner's belief. They argue, instead, that the Hair Length Regulations are valid because they are reasonably related to legitimate penological interests.

The parties filed Motions for Summary Judgment on the hair grooming claim. The Magistrate Judge determined that *Turner v. Safley*, 482 U.S. 78 (1987), was the controlling precedent and that factual issues precluded summary judgment to either party. Defendants object that the controlling precedent should be *Employment Division v. Smith*, 494 U.S. 872 (1990). Alternatively, Defendants argue that the Magistrate Judge misapplied the *Turner* factors and that, under a correct analysis of the *Turner* factors, Defendants are entitled to summary judgment as a matter of

law. Flagner argues that *Turner* is the controlling precedent and he is entitled to summary judgment as a matter of law.

II. LEGAL STANDARD AND ANALYSIS

The standard of review for a magistrate judge's decision regarding a pretrial matter depends upon whether the matter is dispositive. If the matter is "not dispositive of a claim or defense of a party," then the magistrate judge's decision is overturned only if it is "clearly erroneous or contrary to law." Fed. R. Civ. Pro. 72(a). If, however, the matter is dispositive, then the district judge must make a "de novo determination upon the record." Fed. R. Civ. Pro. 72(b). Motions for summary judgment are dispositive and, therefore, the Report and Recommendation will be reviewed de novo.

The Court must first determine whether *turner* or *Smith* is controlling. In *Turner*, the Supreme Court held that "when a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. In *Smith* the Court held that the Free Exercise Clause did not relieve an individual of the duty to comply with neutral, generally applicable laws that incidentally burden a religious practice. *See* 494 U.S. at 882-85.

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act ("RFRA"). The parties initial arguments on this claim were argued under the standards of the RFRA and on January 15, 1997 Magistrate Judge Sherman issued a Report and Recommendation (doc. #24) to grant Flagner's Motion for Injunctive Relief on the basis of the RFRA. Subsequent to the January 15, 1997 Report and Recommendation, the Supreme Court declared the RFRA to be unconstitutional. *See City of Boerne v.*

Flores, 117 S.Ct. 2157 (1997). The Honorable Judge Spiegel then issued an Order Reversing Magistrate Judge's Report and Recommendation (doc. #30) concerning the injunction. Judge Spiegel ruled that because the RFRA had been declared unconstitutional, *Smith* was again the controlling precedent. Order Reversing the Magistrate Judge's Report and Recommendation (doc. #30) p. 3. However, prior to receiving Judge Spiegel's Order, the parties did not brief the issue of whether *Turner* or *Smith* should be the controlling precedent in light of the RFRA being declared unconstitutional.

The parties have had the opportunity now to brief the Court on the issue of whether *Turner* or *Smith* is controlling. The Court agrees with the Magistrate Judge's well-reasoned conclusion that *Turner* is controlling. As the Magistrate judge determined, the Sixth Circuit has continued to apply the pre-RFRA standards set forth in *Turner* in prisoner cases challenging restrictions on the free exercise of religion. Report and Recommendation (doc. #41) p. 5. This Court will do the same.

Defendants' next argue that even under the four factor *Turner* standard, Defendants are entitled to summary judgment as a matter of law. The Court is cognizant of Sixth Circuit case law upholding the Hair Length Regulations on the basis of evidence similar to that the Defendants provide here. *See Williams v. Wilkinson*, No. 96-3715, 1997 WL 809971 (6th Cir. Dec. 18, 1997); *Pollack v. Marshall*, 845 F.2d 656 (6th Cir. 1988); *Davie v. Wingard*, 958 F. Supp. 1244 (S.D. Ohio 1244). The Court finds, however, that *Williams*, *Pollack*, and *Davie* are distinguishable because the plaintiffs in those cases provided little evidence contradicting the legitimate penological interests advanced by defendants.

In contrast, Flagner has provided extensive evidence attacking the validity of each legitimate penological interest Defendants advance in defense of the Hair Length Regulations. The Report and Recommendation thoroughly discussed the penological interests Defendants advance and Flagner's evidence in opposition. The Court need not repeat that analysis here. The Magistrate Judge concluded and the Court agrees that genuine issues of material fact remain in dispute.

Defendant argues that the Court should not view Flagner's situation in a vacuum, but rather within the context of the Ohio penal system. Flagner's evidence in opposition concentrates on the fact that the LeCI and MaCI did not have problems with security, sanitation, or staffing when exemptions from the Hair Length Regulations were granted temporarily to Flagner and four Native Americans. Evidence from a similar individualized inquiry was a sufficient basis to grant judgment for the plaintiffs in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989) (involving the right of Jewish inmates in Michigan to congregate for weekly Sabbath services and an annual Passover Seder). The Court concludes that it is best left for a jury to decide if the Hair Length Regulations are reasonably related to legitimate penological concerns.

III. CONCLUSION

For the reasons set forth above, the Magistrate Judge's Report and Recommendation is hereby ADOPTED.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-96-887

HBRANDON LEE FLAGNER,
Plaintiff,

v.

REGINALD WILKINSON, *et al.*,
Defendants.

Filed: February 3, 1999

REPORT AND RECOMMENDATION

(Spiegel, J.; Sherman, M.J.)

Plaintiff, an inmate at the Madison Correctional Institution (MaCI) and former inmate at the Lebanon Correctional Institution (LeCI), brings this action pursuant to 42 U.S.C. § 1983 challenging various practices of defendants which plaintiff alleges violate his religious beliefs in contravention of the Free Exercise Clause of the First Amendment.[1] Defendants are Reginald Wilkinson, director

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[1] Since the filing of the amended complaint, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, has been declared unconstitutional by the Supreme Court. *See City of Boerne v. Flores*, 117 S. Ct.

of the Ohio Department of Rehabilitation and Correction, the warden and various employees of the Lebanon Correctional Institution, and the warden of the Madison Correctional Institution. Plaintiff alleges that he is an Orthodox Hasidic Jew and that a central tenet of his faith prohibits the cutting of his sidelocks or shaving or cutting his beard. He challenges defendants' enforcement of Ohio Admin. Code § 5120-9-25 (D) and (F), the grooming regulation which requires plaintiff to cut his beard and sidelocks shorter than permitted by the religious tenets of his faith. He also alleges that defendants at LeCI denied him a proper kosher diet and that upon his transfer to MaCI he was assigned to certain kitchen duties which required him to handle or come into contact with pork products or products containing pork. He alleges that defendants' actions violate his rights as protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

This matter is before the Court upon defendants' motion for summary judgment (Doc. 34), plaintiff's cross-motion for partial summary judgment (Doc. 37), defendants' memorandum in opposition to plaintiff's cross-motion for partial summary judgment (Doc. 38), and plaintiff's reply memorandum in support of cross-motion for partial summary judgment. (Doc. 39). Defendants seek summary judgment on the grooming regulation issue only.[2]

2156 (1997). Therefore, plaintiff has no cause of action under RFRA.

[2] Although plaintiff's claims regarding his kitchen job at MaCI and his kosher diet at LeCI, where he resided prior to his transfer to MaCI, were not at issue for purposes of the motion for preliminary injunction previously filed by plaintiff (see Docs. 20, 24, 30), his claims for monetary damages are still viable.

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party must demonstrate the absence of genuine disputes over facts which, under the substantive law governing the issue, could affect the outcome of the action. *Celotex Corp.*, 477 U.S. at 323.

In response to a properly supported summary judgment motion, the non-moving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989). "[A]fter a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting [one's own] earlier deposition testimony." *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249-50. The trial court need not search the entire record for material issues of fact, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989), but must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted. *Street*, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead to a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

FACTS

Plaintiff, Hbrandon Lee Flagner, is an inmate at the Madison Correctional Institution (MaCI) in London, Ohio. Prior to his administrative transfer to MaCI, plaintiff resided at the Lebanon Correctional Institution (LeCI) from July 8, 1994 through November 20, 1996. Plaintiff resided at the Mansfield Correctional Institution prior to his transfer to LeCI.

At the hearing on plaintiff's motion for preliminary injunction in this matter, plaintiff testified that he began studying Orthodox Judaism in 1987. In June 1991, while an inmate at the Mansfield Correctional Institution, plaintiff formally converted to Orthodox Judaism. At that time he began growing his beard and sidelocks in accordance with his religious beliefs. Plaintiff has adhered to the requirements of Orthodox Jewish Law, maintaining a kosher diet and praying three times daily. (Doc. 20, Pl. Exhs. 2, 3; Doc. 37, Exhs. 2-4). Plaintiff testified that according to The Code of Jewish Law and the Torah, he is prohibited from cutting his sidelocks and beard and that it is his sincere belief that to do so constitutes a sin and disobedience to God's command not to cut his hair. (See also Doc. 37, Exhs. 3, 4). For purpose of the motion for summary judgment, defendants do not dispute the sincerity of plaintiff's beliefs concerning the prohibitions on cutting his sidelocks and beard.

Ohio Administrative Code regulations require inmates to maintain hair length at not more than three inches from the scalp. The regulations provides in pertinent part:

> Haircuts shall be provided as needed. Hair and hairstyles shall be clean, neatly trimmed and shall not extend over the ears or the shirt collar. Hair and hairstyle[s] shall not protrude more than three inches from the scalp. Braids and plaits may be worn subject to the limitations of this rule. . . .

Ohio Admin. Code § 5120-9-25(D). The regulations also require inmates to neatly trim beards so that they do not exceed one-half inch in length. Ohio Admin. Code § 5120-9-25(F). The parties have agreed that defendants intend to require plaintiff to comply with the hair length regulations in the future. (Doc. 28 at 4; Doc. 34 at 4).

Plaintiff testified that he did not cut his sidelocks or beard while he was an inmate at the Mansfield Correctional Institution from June 1991 when he converted to Orthodox Judaism until July 8, 1994 when he was transferred to LeCI. Although plaintiff was threatened with disciplinary action by prison officials at the Mansfield Correctional Institution, he was never forced to cut his beard or sidelocks. Plaintiff also testified that officials at the Mansfield Correctional Institution required him to run his fingers through his beard on four occasions to search for contraband. He was never physically searched by prison officials in this regard.

Upon plaintiff's transfer to LeCi in July 1994, he was given numerous direct orders to cut his sidelocks and beard, but refused. Plaintiff was placed in disciplinary isolation on two occasions for his refusal. Plaintiff filed a grievance with

the Institutional Inspector at LeCi requesting an exemption from the forcible cutting of his sidelocks and beard. The grievance was denied on July 11, 1996. (Doc. 37, Exh. 1). On July 29, 1996, plaintiff was given a forced haircut by LeCI officials. Both his sidelocks and beard were cut to one-half inch. On August 2, 1996, subsequent to the forced haircut, plaintiff was photographed by prison officials. Plaintiff received no disciplinary conduct reports from LeCI officials subsequent to the forcible hair cutting, but was maintained in disciplinary isolation. Plaintiff testified that he was directed by LeCI corrections officers to run his fingers through his beard to search for contraband on only two occasions. He testified that the search of his beard took two to three seconds.

On November 20, 1996, plaintiff was transferred to MaCI. He was given numerous direct orders to cut his beard and sidelocks, but such orders were set aside pending the Court's ruling on plaintiff's motion for preliminary injunction. On August 8, 1997, plaintiff's motion for preliminary injunction was denied. (Doc. 30). Plaintiff was permitted to maintain his sidelocks and beard until April of 1998 at which time he was required to cut them to comply with the challenged regulations. (Wingard Depo. at 18).

The facts relating to the security concerns raised by defendants will be discussed below.

Applicable Standard of Review

Defendants contend that the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which formulated a "generally applicable regulation" test, provides the controlling law in this case. Plaintiff contends that the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), which requires that a prison official's actions be "reasonably related to legitimate penological interests," applies instead.

In *Smith*, the Supreme Court upheld the enforcement of a law of neutral and general applicability in a free exercise of religion case even in the absence of a compelling state interest. The Court held that the First Amendment's Free Exercise Clause did not relieve an individual of the duty to comply with neutral, generally applicable laws that incidentally burden a religious practice. 494 U.S. at 882-85. The Religious Freedom Restoration Act was passed by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, which "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress restored the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) for free exercise of religion claims. 42 U.S.C. § 2000bb(b)(1).

The Religious Freedom Restoration Act was later declared unconstitutional by the Supreme Court in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Subsequent to the *Boerne* decision, the courts in this circuit have consistently applied the pre-RFRA standard set forth in *Tuner v. Safley* in prisoner cases challenging restrictions on the free exercise of religion. *See, e.g., Looker v. State of Ohio*, 1998 W.L. 808369 (6th Cir. Nov. 9, 1998) (unpublished); *Boswell v.*

McGinnis, 142 F.3d 432 (6th Cir. 1998) (unpublished), 1998 W.L. 69303; *Brown v. Lewis*, 142 F.3d 432 (6th Cir. 1998) (unpublished), 1998 W.L. 68961; *Williams v. Wilkinson*, 134 F.3d 373 (6th Cir. 1997) (unpublished), 1997 W.L. 809971; *Elohim v. Williams*, 125 F.3d 855 (6th Cir. 1997) (unpublished), 1997 W.L. 589262; *Hasenmeier-McCarthy v. Rose*, 986 F. Supp. 464 (S.D. Ohio 1998) (Sargus, J.); *Abdullah v. Fard*, 974 F. Supp. 1112 (N.D. Ohio 1997). This Court has found no Sixth Circuit case or any district court case in the Sixth Circuit applying the *Smith* standard as defendants urge. *C.f. Shaffer v. Safle*, 148 F.3d 1180 (10th Cir. 1998) (applying *Smith* test in § 1983 prisoner action). Thus, this Court will apply the *Turner* standard in the instant case.

Application of *Turner v. Safley* to the Present Case

Although prison inmates retain the right to religious freedom, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Cruz v. Beto*, 405 U.S. 319 (1972), this right is subject to reasonable restrictions and limitations. *See Cruz*, 405 U.S. at 322; *Bell v. Wolfish*, 441 U.S. 520, 549-51 (1979). An inmate who challenges the actions of prison officials which infringe upon his religious practices or beliefs must first show that the particular practice or belief "is religious in the [inmate's] own scheme of things" and "sincerely held." *Kent v. Johnson*, 821 F.2d 1220, 1224 (6th Cir. 1987). Where the prison policy or action does not affect "an essential tenet" of the inmate's religious beliefs, no First Amendment violation will be found. *Abdur-Rahman v. Michigan Department of Corrections*, 65 F.3d 489, 491 (6th Cir. 1995). *See also Abdullah v. Fard*, 974 F. Supp. 1112 (N.D. Ohio 1997). As indicated above, defendants do not dispute the sincerity of plaintiff's religious beliefs that his Jewish faith prohibits him from shaving or cutting his sidelocks and beard for purposes of the motion for summary judgment.

In determining whether the actions of defendants in this case violate plaintiff's First Amendment rights, the Court must examine whether defendants' actions are reasonably related to legitimate penological interests. *O'Lone*, 482 U.S. at 349; *Turner*, 482 U.S. at 89. The Court's reasonableness inquiry is guided by several factors: whether there is a valid and rational connection between the regulation or restriction and the asserted governmental objective; whether plaintiff has alternative means of exercising his right of freedom of religion; the impact that accommodation of the asserted right will have on others, such as inmates and guards, in the prison; and the existence of ready alternatives to the regulation or restriction that fully accommodate plaintiff's rights. *Turner*, 482 U.S. at 89-91. *See also Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988) (applying *Turner* analysis to an inmate's free exercise claim). "Because the *Turner* factors were developed in the context of facial constitutional challenges, they may or may not lend themselves to an 'as applied' analysis, depending on the facts and circumstances of any given case." *Lyon v. Grossheim*, 803 F. Supp. 1538, 1552 (S.D. Iowa 1992). The *Turner* factors are guidelines to be weighed and balanced in evaluating the reasonableness inquiry, rather than four prongs of a test which must each be satisfied. *Whitney v. Brown*, 882 F.2d 1068, 1076 (6th Cir. 1989); *Munir v. Scott*, 907 F.2d 151 (6th Cir. 1990) (unpublished), 1990 W.L. 92680. Hence, the Court should address those factors which are most helpful and applicable to the given case. *See Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 103 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1682 (1992).

First *Turner* Factor: Is there a valid, rational connection between the application of the grooming regulation to plaintiff and the asserted penological interest?

As an initial matter, the Court recognizes that it must accord prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 103 (6th Cir. 1991); *cert. denied*, 112 S. Ct. 1682 (1992). The protection of internal prison security is "central to all other corrections goals." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). "[J]udgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Turner*, 482 U.S. 78, 86, quoting *Pell*, 417 U.S. at 827.

The Sixth Circuit's application of the *Turner* factors in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), is instructive in this case. In *Whitney*, the Sixth Circuit examined a prison policy which eliminated the intercomplex travel of Jewish inmates to weekly Sabbath services and annual Passover Seders. The Court held that such prohibitions impermissibly infringed on the free exercise rights of the Jewish inmates. The Court examined several justifications presented by prison officials for the ban on intercomplex travel. Such travel allegedly increased the movement between the complex and made Jewish inmates vulnerable to attack by other prisoners. However, the Court found that the factual record failed to support the general claim that Jewish inmates were any more vulnerable to attack than other inmates. Officials also claimed that intercomplex travel enhanced the risk of escape and the risk of contraband smuggling. Yet, the Sixth Circuit found that prison officials failed to present evidence of specific incidents of misconduct

connecting the intercomplex travel by the six Jewish inmates in question and the potential for escape or the smuggling of contraband. 882 F.2d at 1075. Officials also argued that allowing the Jewish prisoners to travel between complexes would impose additional burdens on the guards who would have to search them, as well as additional paperwork. 882 F.2d at 1070-75, 1077. While logically plausible, the Court found these concerns to be exaggerated in light of the facts and evidence presented that six inmates would not pose any real additional security problems given the already busy traffic flow in the prison on Saturdays. We note that the Court repeatedly cited the fact that only six Jewish inmates were involved in the ban in question, out of a total inmate population in excess of 4,500. *Id.* at 1073, 1074, 1075, 1077.

In evaluating the arguments of prison officials, the Sixth Circuit rejected the conclusory justifications posited by prison officials and what the Court viewed as the officials' misreading "of *Turner* and *O'Lone* as holding that federal courts will uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points. They seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it." *Id.* at 1974. *Whitney* teaches that there must be some basis in actual fact for the justifications posed by prison officials, and not merely unsupported generalities. The Sixth Circuit looked to the specific circumstances of the six Jewish inmates involved, indicating that the claimed justifications must be specific to the practice at issue. The *Whitney* Court also found significant the centrality of the belief at issue and the attempted accommodations by prison officials. With respect to the policy banning congregate Passover Seders, the Court noted that the Passover "is an especially critical and very special time in the jewish religion" and the prison policy at issue

"forecloses the only means by which the Jewish inmates may exercise their asserted right to mark Passover." *Id.* at 1073.

In the instant case, defendants assert that the hair length regulation furthers valid penological interests in maintaining institutional security and conserving prison resources. Defendants present the affidavit of defendant Curtis Wingard, the warden of the Madison Correctional Institution. Defendant Wingard states that contraband such as drugs and weapons is a serious problem in Ohio's prisons. He states, "Long hair and thick, full beards and sideburns provide good hiding places for such contraband as drugs and weapons." (Doc. 26, Wingard Aff. ¶ 4). Defendant Wingard states that he has personally found "tobacco, marijuana, and a razor blade hidden in inmates' hair." *Id.* However, when questioned by counsel for plaintiff at his deposition, defendant Wingard admitted he could give no "specific examples" of security problems concerning plaintiff's beard and sidelocks. (Wingard Depo. at 19-20).[3] Nor were any additional security precautions taken with plaintiff during the time period prior to April 1998 when plaintiff's beard and sidelocks were cut. (Wingard Depo. at 20). Plaintiff was the only Orthodox Jew at Madison Correctional Institution, out of an inmate population of over 2500, requesting an exemption from the grooming regulation for religious reasons. (Wingard Depo. at 34-35). Plaintiff testified at the hearing on preliminary injunction that he was permitted to maintain his sidelocks and beard in accordance with his religious beliefs for more than five years prior to the first forcible cutting of his beard and sidelocks. Additionally, during the period prior to April 1998 when plaintiff's beliefs were accommodated, an exemption from the grooming regulation was also granted to four Native Americans.

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[3] The length of the hair on plaintiff's head is not at issue in this case.

(Wingard Depo. at 35). Wingard testified that he knew of no specific incidents of contraband hidden in a Native American inmate's hair during this time period. (Wingard Depo. at 15). The evidence presented by plaintiff places into question whether the extent of defendants' concern about hidden contraband in the beard and sidelocks of plaintiff is justified. Thus, issues of fact exist as to whether accommodations of plaintiff's beliefs caused any specific security problems justifying the restriction on his religious beliefs.

Defendant Wingard also asserts that the hair length regulation further a legitimate security interest by freeing staff members "from the increased demands on their time that would otherwise result from the more frequent, wide ranging and lengthier searches that would be necessary to attempt to control contraband." (Doc. 26, Wingard Aff. ¶6). Yet, at his deposition, Wingard conceded that no additional staff or overtime has been expended to provide security for inmates who have been exempt from the grooming regulation. (Wingard Depo. at 60). Plaintiff testified at the preliminary injunction hearing that no guard ever personally searched his beard or sidelocks, but rather plaintiff was required to run his fingers through his beard and sidelocks on only a few occasions. Such searches of his beard took two to three seconds. Under plaintiff's version, this is far less than the burden of six additional searches found *de minimis* in *Whitney*, 882 F.2d at 1074-78. Thus, the extent of the burden on staff time caused by accommodating plaintiff's religious beliefs is at issue.

Defendant Wingard also states that the increased contact between guards and prisoners resulting from these more intensive searches would increase the potential for violence between the two. (Doc. 26, Wingard Aff. ¶8). Plaintiff testified at the preliminary hearing that he was never physically touched or searched by a guard during the four

years he was exempt from the grooming regulation. The claim that accommodating plaintiff's religious beliefs will increase confrontations with guards is not supported by the record. Plaintiff's experience during the years he was exempt from the hair length regulation belies the concern raised by defendants *See Whitley*, 882 F.2d at 1076.

Defendants also argue that the hair length regulation aids in the detection and control of gang activity within Ohio's prisons and stems hygiene and sanitation problems. (Doc. 26, Wingard Aff. ¶¶15-22, 27-28). Defendant Wingard testified, however, that the wearing of sidelocks and an untrimmed beard are not gang identifiers (Wingard Depo. at 57) and that shaved heads and tattoos, which may indicate gang identification, are permitted within the institution. (Wingard Depo. at 38-44). Inmates with shaved heads or tattoos are simply monitored more closely by prison staff. (Wingard Depo. at 44). It appears incongruous to permit inmates to possess characteristics identified with gangs, such as tattoos and shaved heads, yet disallow an inmate with a sincerely held religious belief to maintain a beard and sidelocks, which have no known relationship to gang identification, for fear of gang activity. In addition, Wingard testified that he knew of no relationship between an inmate's length of hair and disease or medical problems. (Wingard Depo. at 53). While undoubtedly long hair could clog drains, there is no evidence that sidelocks and an untrimmed beard pose the same plumbing problems.

Defendants also assert that "[u]niform application of the Hair Length Regulations further the compelling interest in the security of Ohio's prisons by reinforcing staff authority and discipline over inmates, making the job of controlling the prisons easier." (Doc. 34 at 9; Doc. 26, Wingard Aff. ¶¶12-13). In other words, any deviation from the grooming regulation or any other regulation for that matter, according

to defendants, compromises prison security. Such a rule against differential treatment eviscerates the notion that prisoners retain religious rights. This type of sweeping justification offered by defendants, without any particular evidence showing the relationship to the exemption sought by plaintiff, rules out any accommodations and conflicts with the fourth *Turner* factor mandating the Court to consider alternatives in assessing a regulation's reasonableness. It resembles the conclusory approach rejected by the Sixth Circuit in *Whitney* that "anything prison officials can justify is valid because they have somehow justified it." 882 F.2d at 1074.

Defendants also argue that the grooming regulation is necessary to ensure prompt and accurate identification of escaped inmates. (Doc. 26, Wingard Aff. ¶¶ 23-24; Doc. 34, Hale Aff. ¶¶ 4-12). Undoubtedly the recapture of an escaped inmate is a legitimate penological interest. The Supreme Court in *Turner*, in evaluating the reasonableness of a prison regulation, examined the actual past experiences of prison officials as relevant evidence in this determination. *Turner*, 482 U.S. at 98. Plaintiff presents testimony from defendant Wingard that he was aware of only two escape attempts during his twelve year tenure with the department of corrections and that neither incident was adversely affected by the accuracy of prison photos. (Wingard Depo. at 36-37). Plaintiff also asserts that defendants have photos of plaintiff with his beard and sidelocks, as well as with his shorter facial hair. This evidence presents the Court with a genuine issue of fact regarding whether a disallowance of any exemptions to the grooming regulation for sincerely held religious beliefs as plaintiff's in this case is necessary to protect defendants' interest. Moreover, the five year delay in the forcible cutting of plaintiff's beard and sidelocks from June 1991, when he converted to Judaism, to July 1996, indicates that the enforcement of the grooming regulation against plaintiff may

be an exaggerated response to the security interest advanced by defendants. While the Court recognizes a connection between the hair length regulation and accurate identification of inmates, the readily available alternative of "before" and "after" photographs accommodates plaintiff's religious beliefs at a *de minimis* cost to the prison's penological interests. *Whitney*, 882 F.2d at 1073, 1077.[4]

In view of the above, issues of fact preclude judgment as a matter of law on the first *Turner* factor for either party.

Second *Turner* Factor: does plaintiff have alternative means to exercise his religious beliefs?

The Court now considers the second *Turner* factor, whether alternative means exist for plaintiff to exercise his rights if defendants' refusal to grant him any exemption to the grooming regulation is upheld. Plaintiff testified at the preliminary injunction hearing and presented evidence showing that the Jewish prohibition against cutting his beard and sidelocks is absolute. (See Doc. 20, Pl. Exh. 4 at 1; see also Doc. 20, Pl. Exh. 4 at 2-3). Like the Jewish inmates in *Whitney v. Brown* who without weekly Sabbath services were

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[4] The Court is not unmindful that the same grooming regulation at issue here was upheld by the Sixth Circuit in *Pollock v. Marshall*, 845 F.2d 656 (6th Cir.), *cert. denied*, 488 U.S. 897 (1988), against a challenge by a Lakota American Indian who sought to enjoin prison officials from cutting his hair. *Pollock* is nevertheless distinguishable as the inmate in that case, unlike plaintiff here, failed to challenge the factual basis for the penological justifications asserted by prison officials. This case is more like *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), where there is an absence of a factual underpinning relating to the particular accommodation sought by plaintiff.

left with "nothing" in terms of a communal religious study, 882 F.2d at 1077, plaintiff here who is prevented from observing the commandment prohibiting the cutting of his beard and sidelocks is similarly left with nothing. The ability to exercise the other doctrines of his Orthodox Jewish faith, such as keeping kosher or wearing a yarmulke, in no way substitutes for or mitigates against the seriousness of violating the commandment not to shave one's beard or cut one's sidelocks. The other practices of his Jewish faith are in no way related to the tenet not to cut his beard or sidelocks and do not offer an alternative to keeping his beard and sidelocks in accordance with Orthodox Jewish law.

Third *Turner* Factor: what impact would accommodating plaintiff's religious beliefs have on others?

In terms of the third *Turner* factor, as discussed above, issues of fact exist as to whether exempting plaintiff from the grooming regulation based on his sincerely held religious beliefs would impose more than a minimal burden on prison staff and resources. Whether such an exemption would lead to more "intensive" searches by prison guards as defendants claim or a brief finger search lasting two or three seconds conducted by plaintiff himself is at issue. In addition, plaintiff's evidence showing no additional staff or financial resources were committed toward providing more security for plaintiff and the four other Native American inmates seeking an exemption indicates that defendants' proffered justification for denying an exemption to plaintiff is a debatable issue. Likewise, whether permitting an exemption to plaintiff would increase a perception of preferential treatment to plaintiff and negatively impact other inmates is at issue given the evidence of an absence of any actual security problems posed by the past exemption to plaintiff.

Fourth *Turner* Factor: are there ready alternatives to enforcing the grooming regulation against plaintiff that fully accommodate plaintiff's rights?

The evidence of readily available alternatives to defendants' security concerns indicates that defendants' denial of an exemption to the grooming regulation to plaintiff may be an exaggerated response to prison concerns. *Turner*, 482 U.S. at 90. As discussed above, plaintiff's evidence shows the procedures for searching his beard utilized in the past were minimally invasive and brief. Plaintiff simply ran his fingers through his beard. There is evidence that plaintiff is the only Orthodox Jewish inmate seeking an exemption to the grooming regulation. Moreover, defendants' concern with prompt identification of escaped inmates is mitigated by the existence of photographs of plaintiff with his beard and sidelocks as well as with shorter facial hair following the cutting of his beard in April 1998. Defendants dispute the efficacy of these alternatives. Thus, an issue of fact exists as to whether these readily available alternatives fully accommodate plaintiff's rights at a *de minimis* cost to defendants' security interests.

Summary judgment is not appropriate every time prison officials can articulate a possible but unsupported foundation for a contested regulation. *Whitney*, 882 F.2d at 1074. The Supreme Court in *Turner* and the Sixth Circuit in *Whitney* repeatedly looked to the underlying record for factual support of the articulated justifications for the regulations in question. Defendants have articulated generalized reasons supporting the grooming regulation. Plaintiff's elicitation of the absence of a factual basis for the asserted security concerns casts doubt on and calls into question the credibility of those assertions. These inconsistencies and contradictions in defendants' evidence

create a factual issue of credibility which cannot be resolved on summary judgment. Where the trial judge must assess the credibility of a witness, the case is particularly inappropriate for summary judgment and requires a hearing on the merits. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 909 (6th Cir. 1982). Therefore, defendants' motion for summary judgment and plaintiff's cross-motion for partial summary judgment should be denied.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendants' motion for summary judgment be denied.

2. Plaintiff's cross-motion for partial summary judgment be denied.

Date: 1/29/99

s/Jack Sherman, Jr.
Jack Sherman, Jr.
United States Magistrate Judge